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No. 88-333

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

On Writ Of Certiorari To The Alabama Supreme Court

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

PEARCE'S PRESUMPTION SHOULD NOT APPLY TO RESENTENCING FOLLOWING A WITHDRAWN GUILTY PLEA.

Respondent fails to distinguish between the principle stated in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that a defendant may not be punished by a trial judge for having succeeded in getting his first conviction set aside, and the presumption of vindictiveness adopted in *Pearce*, that any increased sentence on retrial is unlawful unless the trial judge affirmatively justifies it. The principle stated in *Pearce* is a "basic due process protection," *Michigan v. Payne*, 412 U.S. 47, 50 (1973), but the presumption adopted in *Pearce* is a "prophylactic rule," *Colten v. Kentucky*, 407 U.S. 104, 116 (1972), designed "to guard against the possibility of vindictiveness in the resentencing process." *Payne*, 412 U.S. at 51. That distinction is important because that presumption is an exception to the traditional rule that a sentencing judge had broad discretion and may consider a wide range of evidence, *Mistretta v. United States*, 109 S. Ct. 647, 650 (1989); *Williams v. New York*, 337 U.S. 241 (1949), and because that presumption, like other "judicially created rules to implement constitutional guarantees," should be "tailor[ed]" to those situations in which it is necessary. *Texas v. McCullough*, 475 U.S. 134, 142 n.4 (1986).

Respondent argues that it is appropriate to presume that the trial judge acted vindictively in this case because the facts of this case suggest that he did. Resp. Br. 14-22.[1]

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[1] Because counsel for petitioner has not yet received printed copies of respondent's brief, citations to respondent's brief are to the typescript version.

But the question whether a presumption of vindictiveness is appropriate does not hinge on the facts of a particular case. It turns on the question whether in the generality of cases a trial judge is likely to act vindictively when resentencing a defendant who has succeeded in having his guilty plea set aside. A presumption is an evidentiary device allowing the trier of fact to treat proof of a basic fact (*A*) as tantamount to proof of an ultimate fact (*B*) because, as a matter of experience, proof of that basic fact renders so likely the existence of the ultimate fact that it is both sensible and efficient to treat the latter as having also been proved until an adversary disproves it. *McCormick on Evidence* 807 (2d ed. E. Cleary 1972); *Ulster County Court v. Allen*, 442 U.S. 140, 157-160 (1979). When that presumption is mandatory, as it is under *Pearce*, the validity of that presumption is "logically divorced" from the facts of a particular case and instead rests on "the presumption's accuracy in the run of cases." *Allen*, 442 U.S. at 159 (footnote omitted). This court made that point in *United States v. Goodwin*, 457 U.S. 368 (1982). There, in deciding whether the prosecutor acted vindictively in filing new charges after the defendant asked for a jury trial, the Court noted that, since there was no evidence of actual vindictiveness, "[t]he conviction in this case may be reversed only if a *presumption* of vindictiveness – *applicable in all cases* – is warranted." 457 U.S. at 381 (emphasis in original and added).

A presumption of vindictiveness is unjustified in a case such as this one because of both the practice of plea bargaining and the prospect that a trial will reveal previously unknown facts bearing on the defendant's culpability. In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), the

Court upheld a sentencing scheme that offered a prospect of leniency to a defendant who pleaded guilty, and rejected the argument that doing so improperly penalizes a defendant who stands trial.[2] And in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Court recognized that, if the state may be lenient to a defendant who pleads guilty, then the state may deny leniency to a defendant who instead elects to stand trial. Those principles are equally applicable here. Moreover, trials often reveal facts that bear on the heinousness of the crime and the incorrigibility of the defendant, both of which are legitimate sentencing considerations. *Spaziano v. Florida*, 468 U.S. 447, 466-467 (1984); *United States v. Grayson*, 438 U.S. 41, 50-55 (1978). There is no reason to assume that that information will always be available to the sentencer following a guilty plea.

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[2] In *Simpson v. Rice*, the companion case to *Pearce*, the defendant had pleaded guilty at his trial and was sentenced to ten years' imprisonment. After that judgment was set aside on the ground that Rice was not represented by counsel at the time of his original pleas, Rice pleaded not guilty at his retrial, was convicted, and was sentenced to 25 years' imprisonment. Thus, it could be argued that *Pearce* holds that a defendant's decision to change his plea from guilty to not guilty can never be a basis for increasing his sentence. But the factual context of that case indicates that *Pearce* should not be read so broadly. The Court did not consider whether the leniency of the first sentence on account of a guilty plea could justify the increase because the prosecution made no effort to justify the substantial increase in Rice's sentence. *Simpson v. Rice*, 274 F. Supp.

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II.

THE FACTS CONSIDERED BY THE TRIAL COURT SUFFICIENTLY REBUT *PEARCE*'S PRESUMPTION.

Even if a presumption of vindictiveness applies when the same trial judge resentences the defendant after he has withdrawn his guilty plea, that presumption is rebuttable by a variety of different types of evidence. *McCullough*, 475 U.S. at 141 (the presumption can be rebutted by the discovery of evidence showing that the defendant has a prior criminal record); *id.* at 143 (the presumption can be rebutted by evidence at trial showing that the defendant played a more substantial role in the crime, and was therefore more culpable, than was evident from the proof at the first trial); *id.* at 144 (the presumption can be rebutted by the new evidence that the

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116, 121-122 (M.D. Ala. 1967), aff'd on the basis of the district court's decision, 396 F.2d 499 (5th Cir. 1968), aff'd *sub nom. North Carolina v. Pearce*, 395 U.S. 711, 726 (1969). Thus, this Court was entitled to rely on the district court's finding that the sentence was in fact vindictive. Significantly, Justice Black, who argued vigorously that a defendant's change of plea could, as a general rule, justify a less lenient sentence, *id.* at 742-743, stated that he would nonetheless affirm in *Rice* on the basis of the district court's factual finding of the existence of a retaliatory motivation, *id.* at 739. Since *Pearce*, *Corbitt* held that a trial court may extend leniency to a defendant who pleads guilty, which also indicates that *Rice* should not be read broadly. Finally, at the time that *Pearce* was decided, this Court had not yet ruled on the legitimacy of imposing a harsher penalty on a defendant who refuses to plead guilty, see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which also counsels against a broad reading of the *Rice* case. Cf. *Texas v. McCullough*, 475 U.S. at 142 n.4.

defendant committed the crime shortly after he was released from prison); *Wasman v. United States*, 468 U.S. 559, 569-570 (1984) (the presumption can be rebutted by evidence that the defendant was convicted of another crime in the interim between the original and second sentencing proceedings); *Pearce*, 395 U.S. at 723, 726 (the presumption can be rebutted by evidence regarding events or the defendant's conduct after the initial sentencing proceeding). Because various types of evidence can shed light on the character of the offender as well as the crime, *McCullough*, 475 U.S. at 141-143, and since limiting the types of evidence that a trial judge may consider at resentencing would arbitrarily deny the judge valuable information about "the person as well as the crime," *Wasman*, 468 U.S. at 572, and lead to "bizarre" results in some cases, *McCullough*, 475 U.S. at 142, the Court has imposed only two requirements before a trial judge can increase a defendant's original sentence: *First*, the judge must base his reasons for an increased sentence on objective facts that were unknown to him at the first sentencing hearing, or that the judge demonstrably did not consider for a good reason that is no longer applicable. *Second*, the judge must place on the record his reasons for the increased sentence. See *McCullough*, 475 U.S. at 138-144; *Wasman*, 468 U.S. at 569-570, 571-572; *Pearce*, 395 U.S. at 726. Together, those requirements ensure that an increased sentence is not "motivated by vindictiveness on the part of the sentencing judge," the "evil" that due process seeks to prevent, *McCullough*, 475 U.S. at 137, 138, while also permitting a judge sufficient flexibility to impose a sentence that is appropriate to the defendant and to his crime.

Here, the trial judge placed on the record his reasons for the increased sentence, and those reasons were based on objective facts. The judge said that he did not know at the initial sentencing proceeding that respondent had raped and sodomized the victim numerous times on the night of the crimes, or that respondent had threatened the victim with his knife. J.A. 82. The judge also said that he considered respondent's "mental outlook" on the crimes as well as his testimony at trial, *id.*, neither of which the judge could have considered when respondent was first sentenced. Those reasons are clearly sufficient, because a trial judge may consider the aggravated nature of a defendant's actions and a defendant's perjury during trial as factors that justify an enhanced sentence.

Respondent argues that evidence of the facts and circumstances of the defendant's crime presented at a subsequent trial should never be allowed to rebut a presumption of vindictiveness. Resp. Br. 27-28, 32-37. That argument is without merit, for several reasons. To begin with, this Court expressly held in *Texas v. McCullough* that a trial judge may rely on evidence developed at a trial following the defendant's initial sentencing hearing (there, a retrial) as a basis for imposing an increased sentence. 475 U.S. at 143 (proof that the defendant, not his accomplices, had slashed the victim's throat). Moreover, the Court's holding was not limited, as respondent suggests, to cases in which a presumption of vindictiveness does not apply. Resp. Br. 35. While *McCullough* found it inappropriate to presume vindictiveness in that case, the Court also made clear that the facts developed

at the retrial "clearly constitute 'objective information . . . justifying the increased sentence.' " 475 U.S. at 143.[3]

Respondent's claim also lacks merit for another reason. His argument rests on the assumption that trial judges will defy the principle that a defendant may not be vindictively sentenced by trumping up reasons for an increased sentence based on the facts developed at a defendant's trial. Resp. Br. 35-36. In respondent's words, allowing the trial judge to increase a defendant's sentence based on evidence developed at a retrial "creates much too convenient a mechanism for masking a vindictive sentence" and will lead a judge to "substitute form for substance." Resp. Br. 36. Respondent, however, overlooks the requirement that a trial judge place on the record his reasons for the increased sentence, *Pearce*, 395 U.S. at 726, which enables an appellate court to determine whether the trial judge was in fact acting vindictively. Appellate courts are fully capable of performing that inquiry. Moreover, as the Court has noted, "[t]he integrity of the

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[3] There is also no merit to respondent's suggestion that the Court's ruling in *McCullough* is limited to cases in which there is also additional objective evidence from another source that also would justify an increased sentence. Resp. Br. 35. The additional objective information in *McCullough* to which respondent refers – the fact that McCullough committed the murder shortly after being released from prison – was a separate and independent justification for McCullough's increased sentence. 475 U.S. at 144 ("This new objective information *also* amply justified McCullough's increased sentence.") (emphasis added).

judges, and their fidelity to their oaths of office," ordinarily provides "adequate[] assurance" that their sentencing decisions are not based on impermissible factors. *Grayson*, 438 U.S. at 54.

Respondent claims that the trial judge's consideration of the facts of respondent's crimes as developed at trial amounts to improper reliance on subjective factors, not the objective facts required by *Pearce*. Resp. Br. 28-30. That argument is mistaken. *Pearce* requires a judge to rely on " 'objective information . . . justifying the increased sentence,' " *McCullough*, 475 U.S. at 142, quoting *Goodwin*, 457 U.S. at 374, but *Pearce* does not prohibit a judge from making the moral judgment that those objective facts enhance the defendant's blameworthiness. "It is entirely fitting for the moral, factual, and legal judgment of judges * * * to play a meaningful role in sentencing," *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion), and that is also true in resentencing. *McCullough*, 475 U.S. at 143-144. *Pearce* itself recognized that a judge may consider the defendant's " 'mental and moral propensities' " at resentencing, 395 U.S. at 723, quoting *Williams*, 337 U.S. at 245, and required only that the judge's "reasons must be *based upon* objective information," 395 U.S. at 726 (emphasis added). *Pearce* did not forbid a judge from reevaluating the heinousness of the crime or the dangerousness of the offender in light of that new information. And that is all that the trial judge did. J.A. 82, 88.[4]

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[4] Respondent argues that the trial court erred in finding that respondent threatened the victim with the knife. Resp. Br. 28. Respondent rests his argument on the victim's testimony that respondent said that he would not hurt her or her

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Respondent also argues that the trial judge's reasons do not justify increasing the sentence on respondent's burglary conviction, instead of his rape and sodomy convictions, because no new facts regarding the burglary were developed at trial. For that reason, according to respondent, even if the trial judge could increase the sentence on respondent's sexual assault convictions, the judge should not be allowed to increase the sentence on respondent's burglary conviction. Resp. Br. 30-32.[5] Respondent's argument misinterprets what is required to rebut a presumption of vindictiveness.

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children, and the victim's testimony that respondent once placed the knife in the victim's hand. Resp. Br. 28-29. Respondent, however, has not fully described the victim's testimony. Although the victim stated at one point that she saw the knife on the bed, R. 139, she also testified that respondent ran towards her with the knife in his hand, R. 134; that respondent held the knife against her chest, R. 139; that respondent always had at least one of his hands over the victim's hand when respondent placed the knife in the victim's hand, R. 139-140; and that the victim feared "[t]hat if [she] tried to hurt him with the knife that he would hurt [her] or go and hurt [her] children," R. 140. In sum, the evidence was more than ample to support the trial judge's finding that, during the hour when respondent repeatedly assaulted the victim, R. 129-142, 145-146, 162, respondent threatened the victim with his knife. Respondent's statement that he "denied being the attacker," Resp. Br. 29, also overlooks the fact that he told the police before trial that the victim consented to intercourse. R. 198, 202-205.

[5] What the trial court did in this case was to consider the evidence when crafting an overall sentence for respondent. That is a common sentencing practice in the state and federal courts. When defendants are convicted on multiple counts, trial judges routinely devise an overall sentence to fit the case,

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McCullough allows a trial judge to rely on objective facts learned after the defendant was initially sentenced as a basis for imposing an increased sentence. Those facts need not, however, be directly related to the particular crime for which the defendant is convicted. *McCullough* made clear that a defendant can receive an increased sentence if the trial judge learns that the defendant has a prior criminal record of which the judge was unaware when he initially sentenced the defendant. 475 U.S. at 141-142. *Wasman* held that a trial judge can rely on the fact that the defendant was convicted of another crime in the interim between the original and second sentencing hearings. 468 U.S. at 569-570. In both cases, the new facts may be considered because they are objective, even though they were not part of the proof of the offense for which the defendant was sentenced and are not directly related to that crime. That principle is fully applicable in

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then apportion that sentence over the various counts of conviction. See, *e.g.*, *United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir.), cert. denied, 108 S.Ct. 351 (1987); *United States v. Busic*, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981). That appears to have happened in this case. Respondent originally received concurrent 30-year terms of imprisonment on his burglary and rape convictions. J.A. 24. At resentencing, respondent received concurrent terms of life imprisonment on his burglary and sodomy convictions, and a consecutive 150-year sentence for rape. J.A. 83-85. Each sentence had different components and an overall penalty designed to ensure that respondent serves a particular term of years before he is released or becomes eligible for parole, what is known in the vernacular as a "sentencing package." *Shue*, 825 F.2d at 1114.

this case.[6] In any event, burglary under Alabama law consists in an unlawful entry of a dwelling with the intent to commit "a crime therein." *Ala. Code* § 13A-7-5 (1982). Thus, the facts of the "crime[s]" respondent committed after entering the victim's home directly bear on his culpability for burglary.

Finally, respondent attacks the trial judge for what respondent repeatedly calls "bias" or "partiality" on the judge's part, Resp. Br. 9, 19, 29, 30, 34, since the judge knew that respondent had already pleaded guilty and had written a letter to the judge confessing his guilt. Resp. Br. 29-30. Respondent's argument proves too much. Respondent's argument amounts to the proposition that the same trial judge can never impose a more onerous sentence once a defendant has withdrawn his guilty plea, which is just another way of saying that a presumption of vindictiveness can never be rebutted in any such instance. That conclusion is inconsistent with this Court's decisions.

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[6] Respondent's argument is also senseless from a policy standpoint. Suppose that respondent had assaulted not only the victim, but also her children. Respondent's position would prevent the trial judge from relying on that evidence, because it does not bear on his burglary conviction. No sensible policy is served by that rule. In fact, *McCullough* emphasized that a trial judge must be free to consider all relevant objective evidence, because it bears on the question whether the original sentence adequately serves the retributive and deterrent functions of criminal law. 475 U.S. at 142-143.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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